No. 02-1681

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL A. CAMPBELL,

Petitioner,

—v.—

JOHN HANCOCK FINANCIAL SERVICES, INC.,
JOHN HANCOCK LIFE INSURANCE CO.,
and JOHN HANCOCK MUTUAL LIFE INSURANCE CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court review an order summarily affirming the dismissal of a complaint where (i) the multiple grounds for dismissal were entirely consistent with this Court's precedents, (ii) where a Massachusetts state court and other federal appellate courts have consistently rejected similar challenges to insurance company demutualizations, and (iii) where Petitioner attempts to present questions not addressed below?

PARTIES AND CORPORATE DISCLOSURE STATEMENT

All of the parties to the proceeding below are listed in the caption. Respondent John Hancock Life Insurance Company is wholly owned by John Hancock Financial Services, Inc., which is publicly owned. To Respondents' knowledge, there are no persons or corporations who own 10% or more of the shares of John Hancock Financial Services, Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. PETITIONER'S FIRST TWO QUESTIONS WERE NOT RAISED BY THE DECISION BELOW. 6

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER FEDERAL COURT OF APPEALS OR OF THIS COURT 7

A. The District Court's Decision Was A Straightforward Application of *Williamson* 9

B. The District Court's Alternative Holding That Petitioner Is Precluded From Pursuing His Takings Clause Claims Raises No Issue Worthy Of This Court's Review 13

CONCLUSION 16

TABLE OF AUTHORITIES

Cases:

American Manufacturers Mutual Insurance Company v. Sullivan, 526 U.S. 40 (1999) 6-7

Bateman v. City of West Bountiful, 89 F.3d 704 (10th Cir. 1996) 12

Blum v. Yaretsky, 457 U.S. 991 (1982) 7

Boyd v. Jamaica Plan Co-Operative Bank, 7 Mass. App. Ct. 153 (1979) 14

Bromfield v. Treasurer & Receiver General, 390 Mass. 665 (1983) 10

Commissioner of Department of Employment & Training v. Dugan, 428 Mass. 138 (1998) 14

Cowell v. Palmer Township, 263 F.3d 286 (3d Cir. 2001) 12

Cranley v. National Life Insurance Company, 318 F.3d 105 (2d Cir. 2003) 7

Daniels v. Area Plan Commission, 306 F.3d 445 (7th Cir. 2002) 11

Darack v. Mazrimas,
5 Mass. L. Rptr. 469, 1996 WL 406270
(Mass. Super. 1996) 10

Deniz v. Municipality of Guaynabo,
285 F.3d 142 (1st Cir. 2002) 11, 12

Dow Chemical Company v. Stephenson,
No. 02-271, slip op., 539 U.S. __ (June 9, 2003) 15

Front Royal & Warren County Industrial Park Corporation v. Town of Front Royal,
135 F.3d 275 (4th Cir. 1998) 12

Gayman v. Principal Financial Services,
311 F.3d 851 (7th Cir. 2002) 5, 7

Harbours Pointe of Nashotah, LLC v. Village of Nashotah,
278 F.3d 701 (7th Cir. 2002) 12

Harris v. Missouri Conservation Commission,
790 F.2d 678 (8th Cir. 1986) 12

Jama Construction v. City of Los Angeles,
938 F.2d 1045 (9th Cir. 1991) 12

Migra v. Warren City School District Board of Education,
465 U.S. 75 (1984) 13

Montgomery v. Carter County,
226 F.3d 758 (6th Cir. 2000) 11-12

Novak v. Department of Environmental Protection,
6 Mass. L. Rptr. 134, 1996 WL 655782
(Mass. Super. 1996) 10

Ohio State Insurance Company v. Clark,
274 F.2d 771 (6th Cir. 1960) 7

Ordower v. Office of Thrift Supervision,
999 F.2d 1183 (7th Cir. 1993) 7

Ortiz v. Fibreboard Corporation,
527 U.S. 815 (1999) 15-16

Reahard v. Lee County,
30 F.3d 1412 (11th Cir. 1994) 12

Richards v. Jefferson County,
517 U.S. 793 (1996) 15-16

Samaad v. City of Dallas,
940 F.2d 925 (5th Cir. 1991) 12

Stephenson v. Dow Chemical Company,
273 F.3d 249 (2d Cir. 2001) 15

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725 (1997) 10

Tancredi v. Metropolitan Life Insurance Company,
316 F.3d 308 (2d Cir. 2003) 5, 7

Tierney v. John Hancock Mutual Life Insurance Company,
No. 00-0087, 2000 WL 33223223
(Mass. Super. Dec. 18, 2000) .....*passim*

Tyus v. Schoemehl,
93 F.3d 449 (8th Cir. 1996) 14, 16

Villager Pond, Inc. v. Town of Darien,
56 F.3d 375 (2d Cir. 1995) 12

Washlefske v. Winston,
234 F.3d 179 (4th Cir. 2000) 11-12

Williamson County Regional Planning Commission v. Hamilton Bank,
473 U.S. 172 (1985) .....*passim*

Constitutional Provisions:

U.S. Const., Art. I, § 10 (Contracts Clause) 3, 4, 5, 6

U.S. Const., Amend. V (Takings Clause) .....*passim*

Mass. Const. Pt. 1, Art. X..... 10

Statutes:

42 U.S.C. § 1983 3

Mass. Gen. Laws. ch. 175, § 19E 1

Mass. Gen. Laws. ch. 30A, § 14 2

STATEMENT OF THE CASE

In January 2000, John Hancock Mutual Life Insurance Company reorganized from a mutual life insurance company to a stock life insurance company pursuant to section 19E of Chapter 175 of the Massachusetts General Laws (the "Conversion Law"). This process is known as demutualization. John Hancock's Plan of Reorganization (the "Plan") provided that policyholders would exchange their illiquid, nontransferable interests in the mutual company for valuable shares of common stock, cash or policy credits. App. 77. This consideration represented 100% of the value of the company. At the same time, policyholders would retain their life insurance policies and their contractual rights under those policies. App. 77. The principal purpose of the reorganization was to strengthen John Hancock by providing greater organizational flexibility and improved access to capital markets. App. 76.

As required by the Conversion Law, John Hancock submitted the Plan to its policyholders for their approval and to the Massachusetts Commissioner of Insurance ("the Commissioner"). Nearly 94% of the more than one million voting policyholders approved the Plan — far surpassing the statutory requirement of a two-thirds vote. App. 88-89. The Commissioner conducted an adjudicatory hearing at which numerous policyholders presented oral and written statements, including objections to various provisions in the Plan. App. 83-84. In December 1999, the Commissioner approved the Plan in a written decision containing her detailed findings based on an extensive record, including her determination that the "Plan provides each eligible policyholder with 'appropriate consideration' . . . based upon a fair and reasonable formula." App. 95. Petitioner did not

seek to participate in any way in the adjudicatory proceedings before the Commissioner.

Two policyholders who had raised objections to the Plan at the administrative hearing subsequently filed a putative class action in the Superior Court of Massachusetts. *See Tierney v. John Hancock Mut. Life Ins. Co.*, No. 00-0087, 2000 WL 33223223 (Mass. Super. Dec. 18, 2000), *appeal pending* at No. 2001-P-0435 (Mass. App. Ct., Suffolk County).[1] The *Tierney* complaint purported to represent all the policyholders of the former mutual company and sought judicial review of the Commissioner's decision, alleging, among other claims, that the demutualization effected an unconstitutional taking of policyholders' property rights and an impairment of contractual rights that they allegedly derived from John Hancock's Charter and their life insurance contracts. App. 133, 141.

On December 18, 2000, the Massachusetts Superior Court ruled against the *Tierney* plaintiffs on all counts, concluding that the Commissioner's decision violated no constitutional provisions or other rule of law and was supported by substantial evidence.[2] App. 139-153. Petitioner, who was not a named plaintiff in the *Tierney* case, never sought judicial review of the Commissioner's decision.

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[1] The action was brought pursuant to Mass. Gen. Laws. ch. 30A, § 14(7), which provides for judicial review of administrative agency decisions.

[2] The *Tierney* plaintiffs appealed that decision in the Massachusetts Appeals Court, Suffolk County. The appeal has been fully briefed and argued and currently is awaiting decision.

In February 2001 — months after the *Tierney* decision rejected nearly identical claims and more than one year after the Commissioner's approval of the Plan — Petitioner commenced this action in the United States District Court for the Eastern District of Texas. Petitioner purported to bring the action on behalf of all policyholders of the former mutual company challenging certain provisions in the Plan. The action was brought against John Hancock Financial Services, Inc., John Hancock Life Insurance Company, John Hancock Mutual Life Insurance Company (collectively and individually "John Hancock" or the "Company") and the Commissioner.[3] The Complaint purported to assert claims for damages against John Hancock under 42 U.S.C. § 1983 for alleged violations of the Takings Clause and the Contracts Clause, arising from John Hancock's adoption and implementation of the Plan.

Respondents moved for dismissal, abstention or a transfer upon the following grounds: (1) venue in the Eastern District of Texas was improper because the Commissioner was an indispensable party not subject to personal jurisdiction in that forum; (2) none of Petitioner's claims were ripe pursuant to this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); (3) Petitioner's claims were precluded by the *Tierney* decision; (4) no Section 1983 claims could be brought against John Hancock because it is not a state actor; (5) Petitioner's takings clause claims failed because he had identified no protectable property interest in the Company and the circumstances alleged did not give rise to a "taking";

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[3] Petitioner dropped his Complaint as to the Commissioner in the wake of Respondents' argument in their motion to dismiss that the court lacked personal jurisdiction over the Commissioner in Texas. App. 36-37.

(6) Petitioner's contract impairment claim failed because he was not challenging any law and because he purchased his policy after the enactment of the Conversion Law; or (7) that the court should (a) abstain in favor of the pending appeal in the *Tierney* case, or (b) transfer the case to Massachusetts in the interests of justice. Record 43-104.

The motion was referred to Unites States Magistrate Judge Caroline M. Craven, who issued an opinion recommending dismissal of the Complaint in its entirety on the basis that Petitioner's claims were not ripe. App. 25-35. Over Petitioner's objections, United States District Court Judge David J. Folsom concluded that Magistrate Judge Craven's recommendation was correct with respect to Petitioner's takings claims and held that those claims either were (1) not ripe under this Court's decision in *Williamson* because Petitioner had failed to make any attempt to seek just compensation through available state mechanisms, or (2) precluded — based on Petitioner's statements to the court that he was a part of the putative class in *Tierney* or was represented thereby — because the Superior Court of Massachusetts's decision in *Tierney* had addressed the exact same claims and issues that Petitioner raised in his Complaint. The District Court dismissed Petitioner's contract impairment claims because he had alleged only that the application of the Conversion Law to the proposed Plan was unconstitutional but did not challenge the legislature's enactment of the statute or any provisions of the law itself. The court concluded that "actions of administrative or executive officials, private

corporations and individuals, even when applying state law, do not violate the Contract Clause."[4] App. 21-22.

Petitioner appealed the District Court's dismissal of the Complaint to the United States Court of Appeals for the Fifth Circuit. On February 13, 2003, that court (Judges Jones, Wiener and DeMoss) summarily affirmed the lower court's decision without opinion. App. 1-2.

On May 14, 2003, Petitioner filed his petition for a writ of certiorari (the "Petition") with this Court. Petitioner claims that his Petition raises issues identical to those presented in two petitions filed on April 21, 2003 by Petitioner's counsel in two unrelated cases, *Tancredi v. Metropolitan Life Insurance Co.*, No. 02-1542, and *Gayman v. Principal Financial Services*, No. 02-1551, and, in fact, the first two questions in all three petitions are virtually identical.[5]

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[4] It does not appear that Petitioner is seeking review of this basis for the lower court's ruling.

[5] In *Tancredi* and *Gayman*, the courts addressed questions about the constitutionality of insurance demutualizations that are nearly identical to the ones presented to the courts below in this case. However, the Second and Seventh Circuits dismissed the plaintiffs' Section 1983 claims based on a failure to establish the requisite state action. *See Tancredi v. Metropolitan Life Ins. Co.*, 316 F.3d 308 (2d Cir. 2003); *Gayman v. Principal Financial Servs.*, 311 F.3d 851 (7th Cir. 2002). While Respondents here argued that the absence of state action defeated all of Petitioner's claims, the courts below never reached that issue and relied on other grounds to dismiss the Complaint. Because lack of state action would have been an appropriate alternative ground for dismissal of the Complaint, to the extent the Court considers that issue relevant to the Petition, Respondents join in the arguments advanced in the Briefs in Opposition to the Petitions for Certiorari filed by the respondents in *Tancredi* and *Gayman*.

REASONS FOR DENYING THE WRIT

Not one of Petitioner's questions merits review by this Court. Indeed, the Court of Appeals summarily affirmed the District Court's judgment, apparently finding nothing worthy of clarification or expansion therein. The first two questions presented in the Petition involve an issue not reached by the courts below, and Petitioner's third and fourth questions are based on misstatements of the District Court's holding and misinterpretation of the precedent upon which Petitioner relies.

I.
Petitioner's First Two Questions Were Not Raised By The Decision Below.

Petitioner's first two questions concern an interpretation of this Court's precedent regarding state action. But while Respondents argued, *inter alia,* that the Complaint should be dismissed in its entirety for lack of state action, the District Court never reached that issue because it found that Petitioner's takings clause claims were not ripe and that his contract impairment claim failed to challenge a legislative action. Thus, the decision below raises no conflict with respect to this Court's prior state action rulings.[6]

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[6] Moreover, there is no lack of clarity in the long line of precedent from this Court defining state action. Petitioner's claims do not remotely implicate state action. John Hancock is a private corporation which, with the overwhelming approval of its policyholders, decided to reorganize under a state statute. Even the most extensive and pervasive state regulatory involvement is insufficient to transform such private conduct into state action unless the state "has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the State." *American Mfrs. Mut. Ins. Co. v. Sullivan,*

II.
The Decision Below Does Not Conflict With Any Decision Of Another Federal Court of Appeals Or Of This Court.

The lower courts' dismissal of the Complaint is in complete accordance with this Court's holding in *Williamson*, 473 U.S. 172, and with established principles of *res judicata* and collateral estoppel.

In dismissing Petitioner's takings clause claims on ripeness grounds, the District Court made two alternative holdings in order to address the wholly contradictory legal theories presented by Petitioner in the successive briefs he filed in that court. In his initial arguments made in opposition to Respondents' motion to dismiss, Petitioner claimed that he was not a member of the *Tierney* class and thus could not be bound by the state court's rejection of identical claims or precluded from raising those claims in federal court. Record 429-36. However, after the Magistrate Judge recommended

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526 U.S. 40, 52-53 (1999) (internal quotation marks omitted) (finding no state action by private insurers statutorily authorized to withhold payments pending utilization review); *Blum v. Yaretsky*, 457 U.S. 991, 1003-05 (1982) (no state action where state-regulated private nursing homes chose to involuntarily discharge patients). Nor is there any conflict among the circuits as to this issue. Every federal Court of Appeals to have considered this question has concluded that such a corporate reorganization, where authorized by statute but initiated by the corporation itself, does not constitute state action under this Court's precedents. *See Tancredi*, 316 F.3d at 313-14; *Cranley v. Nat'l Life Ins. Co.*, 318 F.3d 105, 111-13 (2d Cir. 2003); *Gayman*, 311 F.3d at 852-53; *Ordower v. Office of Thrift Supervision*, 999 F.2d 1183, 1187 (7th Cir. 1993). While Petitioner claims that these cases conflict with *Ohio State Insurance Company v. Clark*, 274 F.2d 771 (6th Cir. 1960), the *Clark* case did not consider or address the issue of state action.

dismissal, Petitioner argued in his objection to her recommendation that, for the purpose of applying the *Williamson* test, (1) he was a part of the "class of John Hancock policyholders [who] sought just compensation through the procedure created by the Massachusetts legislature," but were "denied just compensation" by the Massachusetts court, Record 538; (2) his participation as "an unnamed class member" in the *Tierney* suit "asserting a takings claim," "satisfied the second *Williamson* ripeness requirement," Record 538-39, 555, and (3) he "may properly rely on the *Tierney* class action to protect his interests." Record 605. At the same time, Petitioner continued to insist that he was not a member of the *Tierney* class and/or represented by the *Tierney* plaintiffs for preclusion purposes.

The District Court justifiably held that Petitioner "cannot have it both ways," App. 16, and went on to make alternative findings based on each set of Petitioner's conflicting allegations. The court found that if Petitioner was not a member of the *Tierney* class, then he was barred by the *Williamson* test from bringing his takings clause claims in federal court because he had failed to pursue any of his available state remedies. App. 9-10. On the other hand, if Petitioner was, as he now claimed, an "unnamed plaintiff" in the *Tierney* suit whose interests were protected by that putative class, then the decision by the Massachusetts Superior Court dismissing identical claims barred Petitioner's suit on principles of *res judicata* or collateral estoppel. App. 14-15.

Neither holding warrants plenary review by this Court.

A. The District Court's Decision Was A Straightforward Application of *Williamson*.

Petitioner claims to seek certiorari "to resolve whether *Williamson* provides a rule of finality or one of exhaustion of state remedies." App. 20. This question both misstates the District Court's holding and misreads the requirements of *Williamson*. First, *Williamson* requires both finality ***and*** pursuit of state remedies. Second, Petitioner's description of the holding below as requiring "exhaustion of all state remedies" is preposterous as it is undisputed that Petitioner never pursued a single state procedure available to him. Petitioner also inaccurately suggests that the Fifth Circuit's decision effects a circuit split with respect to the application of *Williamson*'s ripeness requirement. The cases Petitioner cites do not stand for the propositions he claims and are easily distinguishable from the present case.

The Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." In *Williamson*, this Court set forth two requirements that must be satisfied before a plaintiff's federal takings claim will be deemed ripe. First, the government entity responsible for the taking must have reached a "final decision" with respect to the disposition of the property. *Williamson*, 473 U.S. at 186. Second, where "a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195 ("a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the

State"); *see also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997).

In their motion to dismiss, Respondents argued — and Petitioner never contested — that Petitioner had taken no action in pursuit of just compensation before filing his action in a Texas federal court. He did not participate in any way at the adjudicatory proceedings before the Commissioner. He did not initiate a Rule 30A proceeding in the Massachusetts Superior Court challenging the Commissioner's approval of the Plan — particularly her finding that policyholders received "appropriate consideration" for their membership interests calculated under a "fair and reasonable formula." App. 95. Nor did he seek redress under Article X of the Massachusetts Declaration of Rights.[7]

"Considering only the arguments presented to the Magistrate Judge," including that Petitioner was not part of the *Tierney* class, the District Court found that "[he] did not avail himself of an available state remedy." App. 9. The court further found that Petitioner "has not met his burden . . . of establishing that [he] would 'almost certainly' not be compensated under Massachusetts law at the time the alleged taking occurred." App. 10. The court then applied the *Williamson* test in a straightforward fashion and came to the

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[7] Article X provides that no property shall be taken for public use without reasonable compensation and permits plaintiffs to seek compensation for government takings by filing an appropriate action. Mass. Const., Pt. 1, Art. X; *see, e.g., Bromfield v. Treasurer & Receiver Gen.*, 390 Mass. 665, 668-70 (1983); *Novak v. Dep't of Envtl. Prot.*, 6 Mass. L. Rptr. 134, 1996 WL 655782, at *4-5 (Mass. Super. 1996); *Darack v. Mazrimas*, 5 Mass. L. Rptr. 469, 1996 WL 406270, at *2-3 (Mass. Super. 1996). Article X permits recovery of compensatory damages and a jury trial.

unavoidable conclusion that Petitioner's federal takings clause claims were not ripe. Indeed, the lower courts recognized that Petitioner's federal suit was essentially an attempt to make an end-run around remedies already afforded by the state — remedies that Petitioner either failed or refused to take advantage of. [8]

Petitioner's contention that, in affirming the decision below, the Fifth Circuit joined the First and Seventh Circuits in imposing an "exhaustion requirement" mischaracterizes the holding below and misreads the cases he cites. For example, in *Daniels v. Area Plan Commission*, 306 F.3d 445 (7th Cir. 2002), far from imposing an "exhaustion requirement," the court excused plaintiff from having to satisfy *Williamson's* second prong because plaintiff's property had not diminished in value, making "a suit for monetary relief under Indiana's inverse condemnation proceedings . . . futile if not frivolous." *Id.* at 456-57.[9] Similarly, in both *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000), *cert. denied*, 532 U.S. 983 (2001), and *Montgomery v. Carter County*, 226 F.3d 758 (6th Cir. 2000), the courts found the second prong of *Williamson* inapplicable, because neither of those plaintiffs was seeking monetary compensation but only equitable relief. In fact, in

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[8] Petitioner delayed filing his own putative class action Complaint in a federal district court until more than a year after the expiration of his time to file a challenge to the Commissioner's decision, and after a Massachusetts state court had rejected all of the claims in the *Tierney* complaint — which, with minor exceptions, contained claims and issues identical to those alleged in the present suit.

[9] In *Deniz v. Municipality of Guaynabo*, there also was no discussion of an exhaustion requirement. 285 F.3d 142 (1st Cir. 2002). Rather, the First Circuit determined that the plaintiff's takings claim was not ripe because he failed to show that Puerto Rico's inverse condemnation remedy was inadequate or unavailable. *Id.* at 146-49.

Montgomery, the Sixth Circuit specifically stated that to the extent the plaintiff was seeking just compensation, "the claim is not ripe until the requirements of *Williamson County* are met." 226 F.3d at 767.

In contrast to the precedent he cites, Petitioner expressly seeks monetary compensation for his alleged loss and states that "[n]o equitable relief is requested in this case." App. 74-75. All the Courts of Appeal agree that plaintiffs must first pursue available state proceedings for obtaining just compensation before bringing such a suit in federal court.[10]

Accordingly, there is no issue presented with respect to the District Court's application of *Williamson* and no circuit split implicated by the Fifth Circuit's affirmance of that decision which warrants review in this Court.

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[10] *See, e.g., Deniz*, 285 F.3d 142 (1st Cir. 2002); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 379-80 (2d Cir. 1995), *cert. denied*, 519 U.S. 808 (1996); *Cowell v. Palmer Township*, 263 F.3d 286, 290-91 (3d Cir. 2001); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 282-83 (4th Cir. 1998); *Samaad v. City of Dallas*, 940 F.2d 925, 933-34 (5th Cir. 1991); *Montgomery*, 226 F.3d 758 (6th Cir. 2000); *Harbours Pointe of Nashotah, LLC v. Village of Nashotah*, 278 F.3d 701, 704-06 (7th Cir. 2002); *Harris v. Missouri Conservation Comm'n*, 790 F.2d 678, 680-81 (8th Cir. 1986); *Jama Constr. v. City of Los Angeles*, 938 F.2d 1045, 1047-48 (9th Cir. 1991), *cert. denied*, 503 U.S. 919 (1992); *Bateman v. City of W. Bountiful*, 89 F.3d 704, 707-09 (10th Cir. 1996); *Reahard v. Lee County*, 30 F.3d 1412, 1417-18 (11th Cir. 1994), *cert. denied*, 514 U.S. 1064 (1995).

B. The District Court's Alternative Holding That Petitioner Is Precluded From Pursuing His Takings Clause Claims Raises No Issue Worthy Of This Court's Review.

Petitioner's contention that his due process rights were violated by the District Court's determination that he was bound by the *Tierney* decision is disingenuous and should be rejected. Indeed, the District Court was forced by Petitioner to address the issue of preclusion.

It was Petitioner who urged the District Court to find that his inclusion in the putative *Tierney* class fulfilled the second *Williamson* requirement.[11] App. 9. Accordingly, the District Court concluded that if Petitioner were considered an unnamed *Tierney* class member whose interests were protected to the extent that Petitioner could rely on the state court proceedings to satisfy *Williamson*, then, by that same token, he was precluded from bringing identical claims into federal court by well-settled principles under the Full Faith and Credit Clause. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.").

In making this alternative holding, the District Court noted its "disapprov[al] of [Petitioner's] new argument that he participated in *Tierney* as part of the putative class" and "question[ed] whether such alleged involvement even satisfies the second prong of *Williamson*." App. 16.

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[11] This argument was made for the first time in Petitioner's objections to the Magistrate Judge's recommendation of dismissal. App. 9.

"Assuming it does," the court went on to find that Petitioner was "virtually represented" by the plaintiffs in *Tierney*. App. 16.

After considering whether an "identity of interests" existed between the parties and whether "the present party deliberately maneuvered to avoid the effects of the first action," App. 13, the District Court concluded that because "the same claims and issues were involved in the prior state proceeding, . . . [Petitioner] as either a party to the state court action or as one whose interest was adequately represented by the state court plaintiffs, is bound by the Superior Court's decision."[12] App. 14-15. This conclusion is uncontroversial under Massachusetts law, particularly as it was invited by Petitioner. *See, e.g., Commissioner of Dep't of Employment & Training v. Dugan*, 428 Mass. 138, 141-44 (1998) (dismissing claim when its success depended on a factual question that had been decided against plaintiff in a prior litigation); *Boyd v. Jamaica Plan Co-Operative Bank*, 7 Mass. App. Ct. 153, 158-59, 166 (Mass. App. Ct. 1979) (finding preclusion where party was virtually represented by a party in a prior proceeding: "A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of the rules of *res judicata* as though he were a party." (internal quotation marks omitted)); *see also Tyus v. Schoemehl*, 93 F.3d 449, 456-57 (8th Cir. 1996) (concluding that virtual representation existed where parties' claims and interests were identical, parties in both suits were represented by the same counsel, and tactical maneuvering occurred), *cert. denied*, 520 U.S. 1166 (1997).

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[12] The District Court noted that its finding was reinforced by the fact that "[m]any portions of Plaintiff's brief are identical to portions of the *Tierney* brief." App. 15.

Petitioner's assertion that the decision below disregarded this Court's holding in *Ortiz v. Fibreboard Corporation*, 527 U.S. 815 (1999), is baseless. *Ortiz* dealt with the appropriate circumstances for approving a mandatory settlement class on a limited fund theory under Federal Rule of Civil Procedure 23(b)(1)(B). Concerned about the mandatory settlement of unliquidated damages claims in mass tort suits, the Court rejected approval of a class settlement based on a limited fund theory where the fund was created by agreement of the parties and where problems existed with respect to adequacy of representation and commonality of interests of class members. *See id.* at 864. The decision dealt generally with issues of fairness to absent class members with conflicting interests and did not address principles of issue or claim preclusion.[13]

Moreover, the *Ortiz* Court specifically recognized the principle of virtual representation, stating that "in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." *Id.* at 846 (internal quotation marks omitted); *see also Richards v. Jefferson County*, 517 U.S.

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[13] Similarly unavailing is Petitioner's passing reference to *Dow Chemical Company v. Stephenson*, No. 02-271, slip op., 539 U.S. __ (June 9, 2003) (per curiam), Pet. i, in which an evenly divided Court affirmed the decision below in a single sentence without further discussion. The Second Circuit had permitted certain class members in the Agent Orange litigation who did not become aware of their injuries until after the depletion of the settlement funds to avoid the *res judicata* effect of the class settlement, noting the apparent conflict of interest. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257-58 (2d Cir. 2001). *Dow* is of no relevance here, where there is no question that Petitioner's interests were identical to those of the putative *Tierney* class and where Petitioner has submitted that the class adequately protected his interests.

793, 798 (1996) (exception to rule that one is not bound by a judgment to which one was not a party exists "when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment"); *Tyus*, 93 F.3d at 454-55, 457 (observing that the concept of virtual representation "has a pronounced equitable dimension," and is appropriately applied where "the present party deliberately maneuvered to avoid the effects of the first action" in order to take a second "bite at the litigative apple").

Accordingly, the decision below presents no issues meriting this Court's review.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

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